

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the matter of

Toll Free Service Access Codes

To: The Commission

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) CC Docket No. 95-155

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FEDERAL COMMUNICATIONS COMMISSION

FURTHER COMMENTS OF ICB, INC.

ICB, Inc. ("ICB"), on behalf of itself and its clients, pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. §553(c), and Section and Section 1.415 of the Commission's Rules and Regulations, 47 C.F.R. § 1.415, hereby offers its comments in response to the Commission's 2 July 1997 Public Notice in the captioned matter.

I. INTRODUCTION

ICB, under the trade name ICB Consultancy, is a consulting firm representing numerous toll free service users, such as telemarketers, calling centers and bureaus, shared use vendors, bundled service providers, etc. ICB's consulting clients also include several corporate marketers that are not otherwise involved in the telecommunications industry (i.e., pure end users of toll free services). ICB is very active in the toll free industry as a participant in both the Alliance for Telecommunications Industry Solutions, Inc. ("ATIS") and the Service Management System/800 Number Administration Committee ("SNAC"). ICB publishes *ICB Toll Free News*, the leading trade publication on toll free issues, options, and alternatives for telecommunications and marketing executives. ICB, having a unique perspective on and knowledge of the issues in this proceeding, now offers these further comments.¹

The Commission seeks additional comments in order to refresh the two-year old record in this proceeding prior to the anticipated deployment of the next toll free code next year. Specifically, the Commission seeks comments on the treatment of vanity numbers within 888 and future toll free codes. The Commission has asked "that parties confine their discussion to issues concerning vanity numbers." While every effort will be made to honor this directive to the extent possible, ICB respectfully submits that it is not always possible to compartmentalize issues. ICB believes that the proper treatment of vanity numbers can be achieved only by a reasoned and comprehensive toll free number policy, so that some issues not directly related to vanity numbers per se will nonetheless be relevant to this discussion.

¹ On 27 March 1997 ICB submitted its *Petition for Reconsideration and Clarification* ("ICB Petition"), of the Commission's *Second Report and Order* in this proceeding. In addition, on 20 November 1995 a predecessor of ICB, Interactive Callbrand, submitted reply comments in this proceeding.

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II. REFRESHING THE RECORD VS. SETTING THE RECORD STRAIGHT

The Commission has sought further comments in order to refresh the two-year old record in this proceeding. ICB respectfully suggests that the record is not so much in need of refreshment as correction. The pronouncements thus far uttered by the Commission² and the Common Carrier Bureau³ regarding toll free numbers are based erroneous legal premises regarding private interests in toll free numbers and inaccurate factual assumptions regarding the toll free number supply. The current policy wrongly assumes that numbers are fungible, having no intrinsic value. The policy also attempts to deny any significant private interest in specific numbers. These ideas must be revisited and reevaluated. The Commission can not properly address vanity number reservation and replication issues, much less the overall regulatory structure to govern the opening of new toll free service access codes, until it first modifies its policies to conform with the record evidence, the economic and marketplace realities, and the public interest.

The Commission has blindly jumped from the truism that toll free numbers are a public resource that must be allocated efficiently and fairly to the fallacious conclusion that this precludes any private rights in toll free numbers that might smack of property interest. In an ill-advised rush to outlaw the private "ownership" of numbers, the Commission has effectively negated the inherent "value" in numbers that it has otherwise acknowledged and protected in other contexts. In addressing portability issues, for example, the Commission has recognized that users of telecommunications service develop an interest in maintaining a particular telephone number and has adopted policies protecting such private interest in the number when the subscriber changes service providers. Even in this proceeding, the Commission's entertainment of the idea of 1-888 replication of 1-800 numbers is an acknowledgment, whether or not a conscious one, that a toll free subscriber may enjoy a legally protected private interest in a particular 1-800 number.

The Commission expressly recognizes that holders of vanity numbers (in the broader sense of the term) gain private and legally protected interests—rights, if you will—in the numbers. This is accurate insofar as it goes, but it does not go far enough. The Commission admits that a user of a toll free number assumes some legally protected rights in the number, but at the same time denies that unassigned numbers may, and often do, have similar value. The Commission incorrectly assumes that numbers only gain value from being used and/or marketing. It ignores the reality that many numbers have an intrinsic value even before they are assigned or used. A heavily used and marketed number such as 1-800-COLLECT obviously has great value. But when an

² *Second Report and Order and Further Notice of Proposed Rulemaking* (CC Docket No. 95-155), FCC 97-123, released 11 April 1997, 62 Fed. Reg. 20147-20148 (25 April 1997).

³ *Report and Order* (CC Docket No. 95-155), DA 96-9, 11 FCC Rcd 2496 (1996); Letter dated 13 June 1997 from John B. Muleta, Chief, Enforcement Division, Common Carrier Bureau, to Mr. Joseph J. Weiss, TWC Communications, DA 97-1247.

entrepreneur conceives a new service or product to be marketed by means of a vanity toll free number, the number immediately takes on a significant value to that entrepreneur—even before the entrepreneur has taken any steps to secure the number. Once it is decided to launch a new business using 1-800-NEWIDEA, for example, the toll free number corresponding to "NEWIDEA" now has a unique value to the developer whether it is sitting unassigned in the database, reserved by a RespOrg, or in use by someone who is oblivious to the mnemonic spelled by the number.

There are two very important ideas here. First, toll free numbers have intrinsic value. The value of a particular number may be enhanced by actions of the holder once it is assigned, but there is an intrinsic value even before assignment and use. Second, toll free numbers are not fungible. Different numbers have different values to different users. The Commission's toll free number policies should facilitate the realization of the value of numbers. A policy which assumes that one number has no more intrinsic value than any other number fails in this regard. Free market forces, not regulatory decree, should set the value of numbers.

For all of the reasons stated in its *Petition for Reconsideration and Clarification* ("ICB *Petition*"), ICB submits that Commission policy should permit the private commercial exchange of toll free numbers between users. ICB will not here repeat its entire argument in this regard, but instead incorporates the earlier pleading herein by this reference. By way of summary, however, the Commission's erroneous conclusion that the selling of toll free numbers is contrary to the public interest was based on the inaccurate factual premise that brokering of toll free numbers will prematurely deplete the number supply. There is absolutely no evidence in the record of this proceeding that the private purchase and sale of toll free numbers has had any impact on the number supply. In fact, there is evidence raising serious questions as to whether there is or ever was an actual shortage of 1-800 numbers.⁴ It is just as likely that any such shortage as did exist was attributable to practices of large RespOrg/Carriers rather than to private sales of toll free numbers.

ICB urges the Commission to look beyond the meaningless semantics surrounding such terms as public resource, private interest, and property right to the reality that the ability of users to freely exchange numbers for commercial consideration serves the public interest and does not endanger any legitimate telecommunications regulatory policy. The *only* justification offered for prohibiting the private purchase and sale of toll free numbers is the alleged concern that it creates an incentive to warehouse or hoard numbers leading to potential premature depletion of the number supply. But there is a crucial step of logic missing from this argument, namely, the sale of a number that is already removed from the database has absolutely no impact on the supply of numbers. The

⁴ As noted in ICB's reconsideration pleading, *ICB Petition* at 3-4 & nn.4-5), a SNAC survey of RespOrgs revealed that approximately 3.2 million numbers in the allegedly depleted 1-800 pool were not being served by RespOrgs, and therefore should have been available.

argument is also lacking an important legal basis in that there is no basis in the record in this proceeding to show that the purchase and sale of numbers would in fact deplete the number supply. It is ironic that the Commission would attempt to prevent what it fears is speculation in numbers by itself merely speculating about the possible effect of such transactions. But it is also unlawful in addition to ironic. The Commission's actions must be grounded in the record, and the record here does not support a prohibition on private commercial transfers of numbers.

Accordingly, before even attempting to address the specifics of vanity numbers, the Commission must first correct the inaccurate assumptions and erroneous conclusions underlying its overall toll free number policy. Specifically, the Commission's toll free number policy should incorporate the following principles:

- Numbers have an intrinsic private, commercial value separate and apart from any "added" value that comes as a result of use by the holder.
- Both the intrinsic value and the added value will vary from number to number and from user to user. In other words, toll free numbers are not a fungible commodity. Some numbers have a greater inherent value than others, and the same number may have widely differing values to different users.
- The public interest demands that users be given the full and fair opportunity to obtain the particular numbers they may desire within any particular service code. Free marketplace forces are a far more efficient means of accomplishing this than are governmental regulation and restriction, particularly in view of the quantity and complexity of factors affecting the value of nonfungible toll free numbers.

III. ICB's FURTHER COMMENTS ON THE NPRM

ICB now turns to comments on the specific vanity number questions and issues presented in the *Notice of Proposed Rulemaking* ("NPRM"), FCC 95-419, 10 FCC Rcd 13692 (1995). The Commission was primarily concerned with issues relating to whether holders of vanity 1-800 numbers should be entitled reserve or replicate the corresponding numbers as additional toll free service codes are opened and, if so, how this should be accomplished.

A. Scope of Vanity Numbers

The Commission originally "ask[ed] the parties to identify the total number of equivalent vanity numbers or a method for ascertaining how many numbers are or should be regarded as vanity numbers." *NPRM*, 10 FCC Rcd at 13703, at ¶40. ICB submits that any attempt to narrowly define "vanity"⁵ numbers negates the subjective and intrinsic value of nonfungible toll free numbers. What to one user may seem to be random digits may be deemed a valuable number by another user. The ever changing needs of the users in the commercial marketplace should determine the value of a number, and that consumer determination should not be thwarted by artificial government regulation. Accordingly, assuming it is necessary to prescribe a definition, the one stated in the *NPRM* arrives at the

⁵ The term "vanity" is actually a misnomer. To display "THE GR8ST" on ones automobile license plate might properly be considered a

right idea. The Commission there defined "vanity number" very broadly: "A vanity number is a telephone number for which the letters associated with the number's digits on a telephone [keypad] spell a name or word of value to the number holder. ... [V]anity numbers also include any numbers in which the holders have a particular interest, be it economic, commercial, or otherwise." *NPRM*, 10 FCC Rcd at 13701-13702, ¶¶35. Under this formulation the status is correctly determined by the user's subjective judgment rather than an objective, but nonetheless arbitrary, regulatory test.

Whatever policies are adopted to protect and preserve rights in vanity numbers should apply equally to *any* particular number to which the holder ascribes a particular value, irrespective of whether the number is one normally thought of as "vanity." Such value could be as obvious as a well known brand, e.g., 1-800-FLOWERS, or it may be as subtle as the subscriber having held and marketed a particular number for years. Whatever the nature of and reason for the value placed on a particular number by the holder, Commission policy should allow and facilitate the retention and preservation of that value absent a demonstrated harm to the public interest.

B. Vanity Number Reservation and Replication Proposals

In the *NPRM* the Commission discussed and sought comments on various proposals for addressing the rights of 1-800 numbers in the corresponding numbers in future toll free service access codes. Specifically mentioned proposals included the adoption of a system for right of first refusal, *NPRM*, 10 FCC Rcd at 13703, ¶¶41-43, and restrictions on access to toll free numbers based on Standard Industrial Classification ("SIC") codes, *Id.* At 13703-13704, ¶¶44-45. In the 2 July 1997 Public Notice the Commission also specifically mentioned and sought comment on the potential use of a vanity number lottery.

1. Assignment Based on SIC Codes

Most of the proposals discussed fail to adequately or efficiently address the problem, and some are likely to create more problems than they solve. Any attempt to restrict access to number based on SIC codes, for example, will be administratively burdensome as well as potentially unfair. SIC codes include a vast array of categories and subcategories. The system may be susceptible to abuses that could not be adequately policed by the Commission or DSMI. At the same time, a legitimate and honest user might be precluded based solely on an arbitrary code designation, even though it had no intention of using the number in any way to infringe the rights of the 1-800 number holder. This proposal is thus an open invitation to conflict and dispute, and neither the FCC nor DSMI have sufficient resources to serve as referee.

matter of vanity, but the use on ones trademarked and widely recognized product name in a 1-800 number is a matter of commercial and marketing savvy.

2. Lotteries

The use of a lottery is equally inappropriate. As discussed earlier, unassigned toll free numbers have an intrinsic value that is subjectively assessed differently by each user. Assignment of numbers by random selection, however, negates the users' determination of value and treats all numbers as fungible. This proposal constitutes governmental usurpation of free market determinations, particularly if it is coupled with a prohibition on the subsequent commercial exchange of numbers among users. Less intrusive measures should be used—measures which respect and preserve the users' rights to determine the commercial value of numbers without undue regulatory interference.

3. Right of First Refusal

ICB supports the policy of affording existing 1-800 users a right of first refusal to replicate their numbers in future toll free service access codes. Given the current regulatory structure, which is not ideal, such replication rights are necessary to protect not only the intrinsic value of the numbers held by existing subscribers, but more importantly the added value that has come as a result of the time, effort, and investment on the part of the users, as well as the intellectual property rights of the holders of vanity numbers. Thus, the Commission should expressly provide for replication rights of 1-800 subscribers.

While ICB endorses a right of first refusal scheme for replication of 1-800 numbers, it cautions that this should not be viewed as an ideal or permanent solution. Replication provides immediate and necessary protection for existing toll free subscribers, but it is likely counterproductive in the long run. New codes are opened for the purpose of making more toll free numbers available, so it is counterproductive to open a new code and then immediately decimate the supply by replicating a significant portion of the new numbers.⁶ In the near term, at least, the immediate need for protection of existing users' rights outweighs the inherent inefficiency of replication. The existing toll free marketing industry has substantial sums invested in 1-800 numbers, including valuable intellectual property rights. This is not merely a private interest of the users, it also translates into a public value in the form of a more active and healthy national economy. It would be irresponsible of the Commission not to adopt regulations to protect against the erosion of that value.

ICB thus endorses replication as an interim measure with the caveat that the Commission must concurrently move to establish a more efficient permanent solution. ICB respectfully submits that a system of partitioning or assigning domains is an appropriate long term remedy.

C. Partitioning and Domains

The Commission specifically mentioned a partitioning or domain approach in the *NPRM*, stating: "[W]e may wish to require a partitioning of toll free service, leaving business entities and the majority of vanity number holders to use the 800 code and assigning a specific toll free code to subscribers for personal and pager use." *NPRM* at 13704, ¶44. This approach has many advantages. First, it not only protects the rights of existing 1-800 users, it also makes the regulatory policy conform to the economic and marketing reality that to a significant number of users, 1-800 has become more than an access code, it is a *brand*. Second, it accomplishes the regulatory goal (protection of existing 1-800 users from encroachment) with a minimum of regulatory and administrative involvement by the Commission and DSMI. Third, it is a much more efficient use of toll free numbers. Under a replication scheme, numbers are replicated to prevent their use by others. Under a domain or partitioning scheme, numbers from the new codes are reserved because they are needed for service.⁷ IBC strongly recommends this approach.

IV. ADDITIONAL ICB RECOMMENDATIONS

In addition to the vanity number matters addressed in the *NPRM*, ICB takes this opportunity to offer further comments and recommendations regarding toll free number policy in general. Specifically, ICB asks the Commission to study and address the problem of an inherent conflict of interest between the dual roles of large telecommunications carriers as both RespOrgs and carriers. ICB also recommends that the Commission give consideration to modifying the entire system for access to toll free numbers using the system for assignment of Internet domain names as a model.

A. RespOrg vs. Carrier

Most long distance carriers, and certainly all of the large carriers, are also RespOrgs. One entity is therefore called upon to perform two distinct roles. As a RespOrg the entity serves as the high priest through whom all supplicants must pass to gain access to the Holy Temple of the toll free number database, an essentially public service. As a carrier the entity is a player in a viciously competitive business, and its commercial interests are often directly or indirectly affected by its ability to secure desirable toll free numbers for choice customers or for its own

⁶ According to at least one industry survey, nearly 25% of all 1-800 customers consider their numbers vanity numbers and would seek replication of the corresponding 1-888 numbers. See Appendix B of SNAC's *Comments* in this docket. SNAC conducted a survey of RespOrgs in response to an FCC request for industry information on the necessity and viability of 888 replication of 800 numbers.

⁷ The Commission expressed concern that this approach not be improperly discriminatory, *NPRM*, 10 FCC Rcd at 13704, ¶46, but this should not be a major concern. First, assigning different services to different codes avoids any discrimination between "like" communications services. Second, given the unique regulatory problems being addressed by partitioning, any discrimination that may result should be deemed "reasonable." Finally, the Commission's concern about the possible import of the *Ameritech Order*, 10 FCC Rcd 4596 (see *NPRM*, 10 FCC Rcd at 13704, n.90) is misplaced. That case involved unique circumstances in which the discrimination against cellular and paging carriers was imposed by a local exchange carrier who was in both direct and indirect competition with the affected parties. The domain system suggested here would be imposed equally on all parties by the Commission or an industry group

account. This creates an inherent conflict of interest. Because so few understand the arcane process involved in the reservation and assignment of toll free numbers, and fewer still have access to the database, carriers have the ability and what may amount to an irresistible incentive to exploit their RespOrg status in furtherance of their commercial interests.

The conflict of interest presents a commercially unfair and potentially anticompetitive situation. Large telecommunications carriers are in direct competition with many other entities for access to toll free numbers: smaller long distance carriers (some of whom may not be RespOrgs), telemarketing firms, service bureaus, large end users, miscellaneous common carriers, etc. While the RespOrg is supposed to perform its functions in a nondiscriminatory manner, pecuniary pressures in a highly competitive commercial market may be too much to withstand. When large carriers do abuse their RespOrg status, it may not be so much out of blatant anticompetitive intent as it is due to competitive necessity coupled with the remnants of an old belief that carriers enjoy some special status or control over numbers not enjoyed by mere subscribers. But even in the absence of malevolent motivation, the anticompetitive effect is no less real.⁸

It is incumbent upon the Commission to study the nature and extent of this problem and to begin to develop solutions. ICB does not presume to know at this time the ultimate answer to this problem, although it does have some ideas. These include consideration of imposing nonstructural safeguards and/or structural separations between the dual roles of carrier and RespOrg. Another possibility, addressed in the following section of this pleading, is to begin working toward a fundamental change in the entire toll free number allocation system. One intermediate step the Commission can and should take is to decree that a list of all RespOrgs, including full contact information, be made publicly available. The Commission should also direct that the list, together with educational information regarding the status and role of RespOrgs, be periodically published in such places as telephone books and long distance bill stuffers. While a user now has the theoretical right to use any RespOrg it chooses, even an entity other than its service provider, the practical value of this right is minimal because most users don't know or understand what a RespOrg is. By educating the public to the nature and identity of RespOrgs, at least some minimal degree of competitive pressure will be brought to bear on carriers who are also RespOrgs by making subscribers aware of their right to divorce RespOrg and service provider functions if they so choose. While not a

sanctioned by the Commission.

⁸ ICB does not deny the need and right of telecommunications carriers to maintain supplies of numbers that may not be placed into immediate use by subscribers. As explained in ICB's reconsideration pleading, *ICB Petition* at ¶15, many types of entities (telemarketers, bundled service providers, shared use vendors, etc.) routinely must maintain inventories of temporarily inactive numbers. The needs of telecommunications service providers in this regard are no less legitimate than those of other types of businesses. But, unlike carriers, these other businesses do not enjoy direct access to the available database of toll free numbers. This situation is bad enough in and of itself, but it becomes even worse when, as is often the case, the carrier is also engaged in one of these other lines of business in direct competition with noncarriers. It is simply not equitable for one competitor to have exclusive access to the number supply while other competitors are denied access.

solution to the conflict of interest problem, whatever relief it may provide would come at nominal regulatory and industry cost.

In the meantime, ICB urges the Commission to issue a further notice of proposed rulemaking and/or a notice of inquiry in this proceeding to initiate a comprehensive study of this matter and to solicit comments and suggestions from the industry and the public.

B. Fundamental Reform: The Internet Domain Name Model

Domain names are, in the Internet world, somewhat analogous to vanity numbers in the toll free telephone world. The method by which domain names are handled on the Internet may prove instructive to the Commission as it grapples with toll free vanity number issues. A consistent theme of ICB's comments and arguments throughout this proceeding has been that a freely competitive marketplace is almost always a much better public interest regulator than is governmental coercion. The beauty of the Internet domain name system is that it was developed over time by the users of the system with a minimal amount of governmental regulation. ICB does not suggest that the domain name structure is perfectly transferable to toll free vanity numbers. ICB also acknowledges that the domain name system is not perfect, and is currently addressing its own set of problems and pressures. But it is an established system that has worked well for quite some time, and the Commission should examine it to see what elements of the system might be useful in dealing with toll free vanity numbers.

There are some obvious similarities between Internet domain names and vanity toll free numbers. Both are more often than not commercial in nature. Both are used to establish a linkage, for marketing and communications purposes, between customer recognition of the company or product name and the customer's ability to easily contact the firm, e.g., 1-800-GOFEDEx and www.fedex.com. Both systems involve issues surrounding intellectual property rights (usually trademark) in the domain name or vanity number. And both systems require the maintenance of a centralized database or clearing house to manage the allocation of unique names or numbers on an exclusive basis.

A striking difference between the two systems, however, is the way the central database is handled. Any Internet user can access the InterNIC database to determine the availability and/or status of a given domain name. Any Internet user can, by using the proper forms and following the proper procedures, directly register an available domain name. Or, the user may choose to use an agent, such as its Internet service provider, for domain name registration purposes. Moreover, the entire registration process can be handled electronically. The hallmark of the system, however, is the free availability of information and open access to the database and registration process.

Obtaining vanity toll free numbers (or any toll free number, for that matter) is quite different. End users do not have access to the database. Indeed, users are largely ignorant of the entire process. Information and access is

available only to RespOrgs. As noted in the previous section, however, most toll free subscribers have probably never heard of a RespOrg, much less understand the significance of the role, and so end up with their service provider serving as RespOrg by fiat. To the extent the subscriber attempts to gain meaningful information on the status and availability of particular numbers, it is at the mercy of whatever information is in the possession of its particular RespOrg. ICB knows from personal experience that not all RespOrgs have or disclose the same information at the same time. Moreover, the system is inefficient and cumbersome, being based on paper records rather than electronic transactions.

ICB recommends that the Commission immediately begin an inquiry and/or rulemaking looking toward the modification of the current toll free number allocation system to incorporate the publicly beneficial aspects of the Internet domain name system. Among these should be:

- Direct access to data by subscribers and potential subscribers
- Ability of the user to reserve numbers directly or through an agent or a RespOrg, at the user's option
- Migration toward a system of instantaneous electronic number reservation

This proposal does not require removing carriers from their RespOrg status. Indeed, many subscribers will likely continue to work through their service providers for convenience. But the right of all subscribers to access the system directly or use a non-carrier agent to do so, and the fact that many subscribers will no doubt do so, will provide some added competitive pressure to help correct the inherent conflict of interest between the service providers' dual RespOrg/Carrier roles. Moreover, it will make available directly to the public the information and functions necessary to achieve maximum value from their telecommunications services and products.

V. CONCLUSION

Wherefore, for all the foregoing reasons, and for the reasons stated in ICB's *Petition for Reconsideration and Clarification*, it is respectfully requested that the Commission adopt the above recommendations.

Respectfully submitted,

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